CIV/APN/413/2002

IN THE HIGH COURT OF LESOTHO

THE BASOTHO NATIONAL PARTY & 21 ORS

VS

THE ATTORNEY GENERAL & 11 ORS

JUDGEMENT

LEHOHLA C.J.

This is an urgent interlocutory application moved by the 2nd and 3rd respondents i.e. the Chief Electoral Officer now known as the Director of Elections and the Independent Electoral Commission IEC respectively. These applicants in the interlocutory application are represented by advocate Viljoen briefed by a firm of attorneys Webber Newdigate while the office of the Attorney General is represented by Mr Putsoane. Mr Phoofolo appears for the Basotho National Party and the members of that party who are applicants in the main application and respondents in the interlocutory application.

After hearing arguments advanced on 8th November, 2002 this Court upheld the application in the interlocutory application by the Director of Elections and the Independent Electoral Commission IEC and issued a brief order as follows against applicants in the main application:

(a) That the provisions of the rules be dispensed with on grounds of urgency.

(b) That the dates of hearing of the joinder application be fixed as being the 20th and 21st November 2002.

(c) That the applicants i.e. the Basotho National Party and 21 others in the main application, pay the costs of this interlocutory application on the scale as between attorney and client.

The Notice of application for fixation of 8th November, 2002 as date of hearing this application at 10hoo and issuance of the above order was styled : Notice of Urgent Interlocutory Application for Determination of Date of Hearing for Joinder Application.

The founding affidavit of Mr Leshele Thoahlane the chairman of the IEC was relied upon as giving a broader and more general background that

nonetheless remains relevant to the case as a whole while the supporting affidavit of Mr Denis Peter Molyneaux is specific to the events that left the IEC and the 2nd respondent with no option but to approach this court on as simple a matter as fixation of a date of hearing of a matter moved in the first instance not by Mr Viljoen's clients but Mr Phoofolo's, on grounds of urgency.

Needless to say while the application was filed and served on the other side on 6th November 2002, the notice of intention to oppose was filed on 7th November, 2002 and served on 8th November 2002, according as reflected in the Registrar's Office date stamps and endorsements by respective parties' attorneys' offices.

In an endeavour to explain why IEC and 2nd respondent have sought special costs Mr Viljoen referred the Court to paragraph 3.2 of the deponent Mr Thoahlane's affidavit.

In it the deponent avers that "On 28 June 2002, Applicants i.e. (BNP and others) launched an application, on the grounds of urgency, in which they challenged the result of the elections and requested this Honourable Court to allow a forensic audit of election material and election documents. Documents were not to be destroyed pending the outcome of the forensic audit. Applicants

contended that the forensic audit would demonstrate a result materially different from that announced by 2nd and 3rd respondents and that the true result would indicate that the Applicants were entitled to more seats in Parliament than those allocated to them. This application was brought under case NO:CIV/AND/295/2002 and is hereafter referred to as the main application."

An application along the lines outlined and challenged by Mr Thoahlane above was brought on 28th June 2002 to put in motion steps by the Attorney General in order to investigate the validity of the election held on 25th May, 2002.

In that application General Lekhanya as the Chief deponent averred that he was the applicant for the BNP and said that these elections were not free and fair and thus wanted them investigated with a view to being eventually set aside as invalid.

That application ran to some 184 pages. Indeed it was not something light. It was brought before my Learned Brother Peete J on Friday 28th June 2002. Notice was given to IEC and 2nd respondent three quarters of an hour before what virtually was an ***ex parte*** order was taken giving a rule nisi (with a

certain relief) returnable on 8th July.

Negotiations apparently went on between Mr Phoofolo and Mr Molyneaux conducted in the good spirit displayed by Mr Phoofolo's appreciation that the other side would need time to put in answering affidavits and that Monday 8th was simply too close to accomplish all that was necessary to do by that time. However Mr Phoofolo's commendable attitude was countered by instructions he was eventually to receive at the end of that week in terms whereof if Mr Molyneaux's side was not prepared to agree to something I find most bizarre namely an expansion of the interdict that was granted; in other words, something beyond what was granted namely: giving Mr Phoofolo's Clients custody of election papers, then they were going to ask for confirmation of the rule on Monday the 8th. In reaction to this unwholesome pressure coupled with what Mr Molyneaux found to be totally unreasonable and therefore unacceptable his side put in an application for postponement on Monday the 8th and took two preliminary points ***in limine,*** one of which was non-joinder. Counsel for the excipients arguing that the other side had not joined interested parties; and as indeed wherever this point is raised successfully, the omission to join interested parties is always fatal. Even where it is not raised the Court is at large to raise it ***mero motu*** with equally fatal

consequences as was the case where it was raised for the first time on Appeal by that Court ***mero motu*** in C of A (CIV)NO14 of 1998 **BCP, BNP and MFP vs Director of Elections IEC and anor** (unreported) at page 23 where the Honourable Court said " The appellants should have been non-suited on this ground alone."

The argument went on before my Learned Brother Peete J with both sides represented by Senior Counsel, Mr Viljoen for the IEC and Director of Elections while Mr Pretorius argued the matter for the BNP and others. The learned judge reserved the judgement until 21st July, 2002. In it he indicated that although he found merit in the points raised ***in limine*** he was nonetheless not going to decide the matter then.

In total disregard of the concerns of the Court of Appeal demurring the practice of pressing the other litigant and denying him/her time to prepare their defences as shown in Court of Appeal decision in C of A (CIV) NO14 of 1998 above it appears that the applicants in the main application thoroughly relished the inconvenience to which the respondents were subjected by the order that the applicants obtained. Hence Mr Viljoen's finding himself compelled to raise his points ***in limine*** without giving any notice for indeed his side was brought

to Court unexpectedly and in exceedingly brief time. Peete J then having voiced his view that the question of non-joinder is bad in law nonetheless decided that all these matters raised could be sorted out in the main application. Thus he ordered that the case be postponed to 2nd September 2002. The order for postponement was made on 25th July. The answering affidavits of the Attorney General, the Director of Elections and the IEC were to be put in by 16th August 2002 and the replies by 30th August 2002 and further that on 2nd September 2002 Counsel must meet in the office of the Registrar for a date of hearing of that matter.

At this stage it seems despite the inconvenience to which his side was put immediately earlier, Mr Viljoen was satisfied that he was afforded some respite and would thus be able to put in answering affidavits and hopefully after the other side had replied a date of hearing could be arranged with them by 2nd September 2002.

Obligingly the IEC side put in their answer before 16th August as the judge had ordered. Instead of putting in the reply by 30th of August 2002 the BNP and General Lekhanya launched an application for joinder of some other political parties. While thus defying the Court order that enjoined them to file

their replies by 30th August they took for granted that their strategy would be acceptable to Court, namely to hold off submitting the replying affidavits indefinitely until those other parties had indicated whether they were going to join that application or not and for that reason the whole application that had been brought as a matter of urgency on three quarters of an hour's notice.

It seems that the BNP and General Lekhanya entertained a somewhat strange hope that if their joinder application remained hanging as it did for the rest of July and months following, the excipients would forego or even abandon the points they had earlier raised ***in limine*** regarding which no resolution had been made.

With this background in mind Mr Viljoen gave a reasonable warning to the other side that they had better conclude their application for joinder in quick time for he was going to raise those points ***in limine*** again which were contained in the main application.

A neat summary of the case Mr Viljoen was going to raise against the BNP and General Lekhanya was:

(a) You haven't joined all the people/parties that have to be joined (An omission that is fatal in applications brought ***ex parte***).

(b) You say it is really not necessary to join them , you are just joining them because it is expedient.

(c) There is a legal argument which is in favour of the IEC and the Director of Elections by virtue of which even before they can be called upon to say a word would put an end to the entire case. So get on and complete your joinder application by submitting your replying affidavit to enable my side to address this argument.

All the necessary ingredients to this intolerable saga are contained in pages 6 to 10 of Mr Thoahlane's affidavit.

I may just extract verbatim paragraphs 4.2 and 4.3 for greater clarity. The deponent avers in paragraph 4.2.

"Applicants failed to file their Replying affidavit/s by 30th August 2002, as required by the order granted by this Honourable Court on 25 July 2002.

Instead, they launched the joinder application, in which they sought an order joining each of the political parties who had secured seats in the general election, (sic) leave to file their Replying affidavits within fifteen days of the filing of the Answering Affidavits of the new Respondents as well as condonation of their failure to serve a copy of the main application on the Speaker of the National Assembly as required by Rule 14(2) of the Constitution Litigation Rules, 2002.

4.3 First, Second, Third and Sixth Respondents entered an appearance to oppose the joinder application. Second and Third Respondents served their Answering Affidavits therein on 3 October 2002. Respondents contend that the joinder application should not be granted because the manner in which Applicants have approached this litigation has the effect of drawing out the already unnecessarily protracted proceedings unconscionably and that this is directly contrary to bringing about expeditious certainty which is intended by section 69 of the Constitution and the Election Act. Respondents submit that it is not only they who are being prejudiced by this, but the entire country.

> Moreover, at the hearing of the application for joinder, Respondents intend raising again points ***in limine*** left open by Peete J, and more particularly the argument that the main application itself is fatally flawed, in law, so that the joinder sought would serve no purpose".

I agree entirely with the submission made by Mr Viljoen premised on the fears and concerns expressed in the averments quoted above.

This Court is alert to the efforts by the IEC and their legal representatives made moving heaven and earth to bring this matter to finality. This Court is also mindful of the conscious effort by Monaphathi J calling the parties to his Chambers for fixation of a date of hearing and shortly thereafter sending them to my Chambers for the purpose. I should emphasise that from all these efforts including Monaphathi J's in particular the Court clearly did not want this big Constitutional matter affecting the whole election hanging over the people and tempting them to say Judges are not giving this matter its due weight.

On 14th October 2002, Mr Molyneaux and Mr Phoofolo for the respective parties duly came to my Chambers for the purpose of arranging an early date

for the hearing in line with Mr Molyneaux's letter "LT4" dated 4th October 2002, and addressed to Messrs EH Phoofolo and Co in which it is recorded that all the parties were in agreement that the matter in question should be heard by a full Bench of the High Court consisting of three Judges.

In real earnest of his desire that the hearing of the main application brought by the BNP and General Lekhanya for a forensic audit is expeditiously dealt with my Brother Monaphathi J is recorded in the above letter as having requested the parties' legal representatives to a meeting with him on 22nd October, 2002. But lo and behold! the meeting failed to take place because of the absence of the attorney whose clients had launched the main application as well as the application for joinder on an ***urgent*** basis! An application brought by those applicants to challenge the validity of the entire general election is now marked by a clear sign of stalling by the attorneys of those who had brought it in the first place. Not only are their attorneys bearing this unacceptable blot on their escutcheon but the clients as well did no better when as earlier indicated they both breached and ignored my Brother Peete's order to file their replies by 30th August 2002. All of this had a negative impact on the need to resolve that matter timeously. But apparently all the anxiety and uncertainty generated by this delay and possible degeneracy in the upkeep of law and order that

impatience by the general populace might give birth to were no skin off their nose as they indulged in procrastinating, dilly-dallying and paying scant regard to the need to have this matter resolved speedily.

In "LT4" Mr Molyneaux had intimated to Mr Phoofolo that Senior Counsel briefed by Mr Molyneaux would be available for the dates 12th and 13th November 2002. The idea being to enable Mr Phoofolo to propose these dates to his Counsel Mr Pretorious accordingly so that at a meeting scheduled for 6th October 2002 before Monaphathi J the learned Judge could be informed of dates suitable to all concerned.

Needless to say all this went without a move one way or the other save that when Mr Molyneaux and Mr Phoofolo came into my Chambers on 14th October as I earlier indicated it was agreed that Counsel for Mr Phoofolo's clients would be available for days ranging between 14th and 21st November 2002. The understanding being that if the matter needed more than a day's hearing Mr Pretorius who is supposedly Counsel in question would be available even for the next day following the first day of hearing.

Indeed LT5 dated 16-10-2002 and addressed to Messrs EH Phoofolo and Co accurately sums up the situation as follows:

"As this application is to be heard by a panel of three Judges, special arrangements have to be made with the Chief Justice for the allocation of a date for hearing of the matter. Such a meeting was held, attended by the writer and your Mr Phoofolo on October 2002 when the Chief Justice indicated that he could grant dates within the period 14 to 21 November 2002 for the hearing of this matter". See paragraph 2 of "LT5" at page 23 of the record.

In that letter the writer intimated to the addressees that the writer's Counsel would definitely be available for the dates 19th and 20th, could the addressees therefore say as a matter of urgency if their Counsel would find those dates suitable in order to advise the Chief Justice in turn of the position.

Nothing was heard from Mr Phoofolo despite the urgency that the writer had expressed his response required in a matter moved on the basis of urgency by him and his clients. Because of this silence from Mr Phoofolo's side the writer impelled by a keen sense of duty to Court and to his clients; and indeed moved by no less regard for proper and dignified administration of justice and, no doubt, apprehensive of the adverse impact of the diminution of the interval

between the day of the meeting with the Chief Justice and the first date marking the period of dates set aside for hearing of the matter, wrote "LT6" dated 22 October 2002.

In that letter the writer urged Mr Phoofolo to speedily say if 19th and 20th November, 2002 would be suitable following their discussion on 21st October, 2002. In his reply Mr Phoofolo stated that though he had secured Counsel, that Counsel would nonetheless not be available for the dates set aside for the hearing of the matter by the Chief Justice. The reason being that "it is not easy at this time to find Counsel who is readily available and that there aren't open days to accommodate a matter at that short notice."

I deem this an unacceptable excuse, first; because a party who brings a matter to Court is obliged to have Counsel who is able to accommodate himself within the Court's time-table if such Counsel has been briefed. Next, because a party who has brought a matter to Court on the basis of urgency cannot be heard to say he/she is not able to proceed because of the shortness of notice he/she has had to give to his or her Counsel. In such circumstances the briefing attorney is required to get on himself with the matter he placed before Court in the first place. He or she has to appreciate that the other party has been put to great

inconvenience and if that other party is ready to face his opponent in Court despite that inconvenience there would be little or no reason to keep him waiting while that opponent is obviously busy twirling his thumbs under the guise that he is considering a variety of options as to which Counsel to have.

The other reason advanced by Mr Phoofolo for the fact that the dates set aside for hearing were unsuitable was that the same Counsel referred to above was busy preparing a substantive application challenging the constitutional validity of the May 2002 General Elections held in Lesotho.

It was alleged that this new application would be lodged on 30th October 2002. In his letter Mr Phoofolo suggested to the addressees that because this new application would have a serious impact on the applications pending before Court it might be necessary for the Chief Justice and the addressees to look at this "major" application in order to consider whether it might not make practical sense to have it heard with other pending applications. (I suppose reference to pending applications above is reference to Election Petitions for which the Chief Justice had set aside days ranging initially between days in late October and early November which days were later altered to the present roll owing to one of the respondents' instructing attorneys Mr Moiloa being indisposed and on

sick leave).

In terms of LT8 dated 24th October 2002 Mr Molyneaux replied suggesting to Mr Phoofolo to secure other Counsel who is available for the dates suggested by the Chief Justice. A fresh amount of plentiful time was availed by the respondents for Mr Phoofolo to do that on behalf of his clients the applicants i.e. the BNP and General Lekhanya. At page 29 of the record which is the next page of LT8 the writer Mr Molyneaux lays stress as follows:

"It is clear from your letter that you fully appreciate the inconvenience and delay which will be caused by these fresh proposals and the further application. Our clients, too, believe that a speedy resolution of the disputes regarding elections, as set out in the main application, is required for certainty to be obtained as soon as reasonably possible. Furthermore, it is not just our clients who will be prejudiced by further delay, but the entire country. Our clients view this latest development as nothing more than another instance of your clients' forging ahead as they think fit, disregarding and causing further lengthy delays in a matter which deserves to be expeditiously concluded for the good of the country as a whole." I entirely agree with sentiments fittingly expressed in the above extracts of LT8 above.

In the last two paragraphs of that letter the writer understandably and aptly points out:

"In the circumstances, our clients insist that the hearing of your application for joinder proceed on one of the dates allocated by the Court, namely 14th and 15th or 18th - 21st November 2002. There is no reason why the issue of joinder cannot be disposed of now.

We call on you to confirm by Monday, 27th October 2002, that the application for joinder will proceed on two of the days allocated by the Honourable Court. (We believe that two days would, for safety sake, be provided for and you must specify two of the dates as being suitable to you.) If you fail to do so, we are instructed to bring an urgent application, that the application for joinder be heard on 19 and 20 November, whether or not your clients are represented or have filled a replying affidavit by then."

Indeed by then the respondents were left with no option but to try to bring home to the applicants' attorneys that the Chief Justice had given the parties seven days on which their matter could be heard. Any two of those days could be availed to a party who was willing to proceed when it seemed the other party was stalling despite the real pressing need for the matter to be proceeded with in

order to remove any uncertainty on as great an issue as the ultimate result of General Elections.

In this instance the respondents made their own choice of the two days falling among the 7 which had been allocated by the Chief Justice in the presence of the applicants' legal representative who had come to the CJ's Chambers for the purpose of finding and fixing suitable days for the hearing. I cannot therefore fault the respondents for feeling compelled to compel the hearing. Needless to say the instant application is the one they brought for compelling the hearing of the application for joinder due on 19th and 20th November as set out in the respondents' notice of motion.

However there are some steps in between which the Court, it was urged, need know in order to appreciate the reason for the scale of costs contended for by the respondents.

As neatly stated in Mr Viljoen's oral submissions the letter just referred to above did not receive an immediate reply. However in terms of DP1 dated 29th October 2002 appearing on page 33 of the record Mr Phoofolo's attitude while seemingly being that it is acceptable that the application for joinder be proceeded

with on 20th November 2002 as he correctly felt it would not be necessary for it to take up two court days, he somewhat threw the spanner into the works by attaching certain conditions to the hearing of the matter on the date referred to above; namely that parties to be joined be allowed to file their answering affidavits if the application for joinder is successful, and that arguments on the pending application would take place on some unspecified future date not necessarily coinciding with the date for the hearing of the new application.

See Mr Molyneaux affidavit relating to DP1. In response to DP1 Mr Molyneaux wrote DP2 reference to which is made in his affidavit. The important point raised in DP2 is that the respondents "intend raising the points ***in limine*** previously argued once more when the joinder application is argued." The writer despite his qualms to the contrary expressed the view that 20th November 2002 was acceptable as a date of hearing and gave notice that the next day should be available if argument is not completed on 20 November.

Mr Molyneaux further placed on record that even as of 31st October 2002 (being the date of writing of DP2) the "new substantive application" intended to be brought on 29th October 2002 as reflected in the letter of 23rd October 2002, had not yet taken place.

Mr Molyneaux further disproved any assurances being sought by Mr Phoofolo that the new application would be heard with the main application and categorically stated that there was no such undertaking. My careful consideration of the correspondence placed before me indeed bears Mr Molyneaux out on this point.

Mr Molyneaux went further to distance himself from any implicit commitments he is supposed to have made by saying openly ".... We have no idea what your new application entails, are not willing to have it delay the resolution of the application already brought in any manner and will deal with such new application, on its merits, once we have sight of it. Certainly we make no concession that dealing with the "new application" together with application 295/2002, has any merit."

Mr Molyneaux in an attempt to clarify his stand beyond question further stated in his letter DP2 at page 37:

"As we read your letter there is no condition in it that the application for joinder will be argued on 20 November 2002 only if we accept certain conditions regarding when argument of the "new application" will occur. In the circumstances we are not serving on you the application (already drawn) to

compel the hearing of the present application on one of the dates provided by the Honourable Chief Justice.

However, we cannot be sure that our assumption is correct in the light of the way in which your letter is worded. Accordingly, we require confirmation by noon Friday, 1 November 2002, that the matter will proceed on 20-11-2002, despite our refusal to accept the conditions mentioned in your letter. If we do not receive such confirmation we shall file our already prepared application to compel the hearing of the joinder application on 20 and 21 November 2002."

Reading this letter it is understandable that as the date of hearing was fast approaching without any firm undertaking that is without conditions by Mr Phoofolo, Mr Molyneaux was anxious to be assured that the absence of Counsel needed by Mr Phoofolo if the worst came to the worst would occasion no hindrance to the hearing of the matter on the date in question.

However, there was no confirmation received. (See page 20 of the transcribed record). No letter was received for confirmation despite the understandably urgent need to put the other party in certainty about all this. Consequently Mr Molyneaux telephone Mr Phoofolo as set out in paragraph 2 of

Mr Molyneaux's affidavit as follows:

"When the response called for in paragraph 5 of "DP2" had not been received by noon on Friday, 1 November 2002, I telephoned Mr Phoofolo. I record what passed between us in the letter annexed hereto, dated Monday 4th November 2002 DPM3 (sic) and confirm the correctness of what is stated therein."

In brief DP3 is a means by which the writer places on record the fact that he telephoned Mr Phoofolo to inquire why there was no response to his letter despite the stipulated response time of noon of Friday 1st November 2002. Further that Mr Phoofolo suggested he needed time to look into the matter and requested that he be given until after the weekend to take instructions which request was turned down. Mr Molyneaux further placed on record that Mr Phoofolo reverted to him later to say his instructions of 29th October 2002 were to add or substract anything (sic) thereto.

Mr Molyneaux further placed on record that Mr Phoofolo confirmed that the matter would proceed on 20th November 2002. In the light thereof Mr Molyneaux proceeded to set the matter down for that date accordingly.

In paragraph 3 of his affidavit Mr Molyneaux avers that in response and to his astonishment he saw Mr Phoofolo's letter "DP4" dated 5-11-2002. In that letter, though Mr Molyneaux is gracious enough to say he does not believe the letter to have been drafted by Mr Phoofolo, the writer says he did not confirm that applicants agreed to the hearing on joinder proceeding on 20 November 2002 in the telephone conversation between the deponent and Mr Phoofolo. In a brief response to this Mr Molyneaux says in his affidavit "With respect, that is not true." I believe him.

The reasoning forming the basis of the deponent's attitude is appealing to me and I accept it as such. In it he avers in the middle of paragraph 3 at page 31 of the record:

"The specific purpose of my call was to establish whether the applicants' express indication that they were prepared to continue with the hearing on joinder on 20 November was unconditional, as appeared to me (and Counsel) to be the case. This application was already drawn and ready to serve at that time (as is confirmed in paragraph 5 of my letter of 30 October DP2). If Mr Phoofolo had not given the assurance recorded in my letter, DP3, the application would immediately have been lodged." I accept this text as projecting the true state of the matter under consideration.

Mr Viljoen in an endeavour to say why a special order of costs was warranted in this proceeding drew the Court's attention to one more letter "DP4" dated 5th November 2002 emanating from the offices of Messrs EH Phoofolo and Co.

In it the writer says to the addressees " ..... Your letter does not accurately reflect the instructions which took place between our Mr Phoofolo and your Mr Molyneaux. Our Mr Phoofolo did *not* confirm that the applicants agree that the matter will proceed and be argued on 20 November 2002.....Our Clients have launched a substantive constitutional application on 31 October 2002 in the High Court under constitutional case number 4/02 as foreshadowed in our previous letters to you. The application papers were served on the respondents on Friday 1st November 2002..... Our Clients are presently seeking Counsel's advice in regard to an objection to be lodged against the Honourable Chief Justice Mr Lehohla from hearing any of the BNP's applications. Our Clients will further object to any judge that has served on the Council of State.....from hearing matters in which our clients are the applicants.....

Our instructions are further not to engage in any further communication with your Mr Molyneaux, all future communications between Webber Newdigate and EH Phoofolo and Co are to be in writing....."

In response to the substance of the letter DP4 and demurring at the fact that it was at all attached by the respondents to their papers Mr Phoofolo said that it appears to have been annexed to those papers for an ulterior purpose namely to give the impression that he and his Clients do not respect the Chief Justice and stated that he and his Clients respect the Chief Justice.

He stated that there was no need for respondents to move this application as he had not objected to the intended application being moved on 20 November 2002. He made merit of the fact that he was present in Court following notice of set down for the instant proceeding. He indicated that as he had no objection to the intended application being moved on 20 November 2002 there was no need for respondents having employed Senior Counsel to move this application.

He intimated that this was a result of a misunderstanding that emanated from no malice.

My problem then arose how in order to dispel any misunderstanding finally but before this was set down Mr Phoofolo thought he could at the last minute stop Mr Molyneaux from taking papers to Court to move this application if, as it seems to be the case, his clients obstructed him from applying the only sensible means namely use of the telephone to communicate with Mr Molyneaux without delay to avoid having had this matter set in motion before Court. Needless to say Mr Phoofolo was in a cleft stick and could not give any meaningful answer to allay my anxiety.

It cannot be over-emphasised that in order to function properly the Court needs services of respective Counsel or practitioners appearing and arguing causes for their clients. If for some obscure reason Counsel is obstructed by his own clients from communicating with Counsel for the other side it is not only the Court that is placed at a disadvantage but the very course of justice is placed in jeopardy. Doing such a thoughtless thing amounts to no more than clients standing in the way of their own interest; for as stated during the proceedings respective Counsel fulfil the role of two wings to a plane. Their communication helps the Court function properly much as the two wings of a plane help keep the plane aloft. If one of them is broken, the remaining one is rendered useless and the plane cannot be kept aloft.

I cannot step off the question of the importance of the use both ordinarily and in emergencies of a telephone without referring to the famous works of Alan Paton in his book ***Cry The Beloved Country*** where he shows the central character there called Rev. Kumalo being forced by circumstances to undertake a journey from his small village in Natal to the bustling and intimidating City of Johannesburg which he hated intensely for more than a dozen reasons; yet one thing fascinated him in that city to which his brother, sister and son had gone never to come back home. Alan Paton says that Rev. Kumalo on seeing that his brother owned a telephone " felt extremely proud to be a relative of someone who possessed such a thing."

Next, the Leon Commission of inquiry into the debacle following the 1998 General Elections in Lesotho in the only criticism it levelled against the Prime Minister for inviting the SADC forces into Lesotho without informing the King was that he could have used the cellphone if he had been impeded from physical contact with the King.

Taking into account all the frequent stalling and failure to respond timeously or at all to respondents' questions prompted by the observation that the passage of time seemed not to bother the applicants much, notwithstanding

that time was of the essence, one gains a distinct impression that the applicants brought the application to Court not for purposes of seeking relief but to generate uncertainty on a massive scale and thereby create rumour which hopefully would feed on more rumour resulting in more uncertainty and therefore anxiety. **Vide** the reason for the letter saying a substantive application was going to be moved on 29th October to challenge the constitutional validity of the 2002 General Election when in effect as of 31 October no such application had been moved yet this was given as the reason for failure to give a firm undertaking that all will be ready to enable the joinder application which in reality was before Court to take off on 20th November 2002.

Added to the rumour was the spicy information that Senior Counsel from South Africa had been briefed though he is simply unable to attend Court when so required for purposes of proceeding with the case and bringing about certainty of the results of the 2002 General Elections in the minds of all parties concerned and the country as a whole.

In doing all the unwholesome acts set out in the two paragraphs set out above it seems to me that the applicants in the main application are blissfully forgetful of the creditable words seasonably expressed by Steyn P in C of A

(CIV) No.14/98 ***Basutoland Congress Party*** & 2 Ors Vs ***Director of Elections & 2 Ors*** (unreported) at Page 26 as follows:

" The vesting of a democratic culture is a process, not an event. It is clear from the amended National Assembly Election Order that the Kingdom of Lesotho has committed itself to embarking upon this process. It has done so with appropriate ***emphasis on full participation and transparency with the goal of universal suffrage being achieved through a free and fair electoral process.***

Whilst therefore parties must always feel free to challenge any material deviation or departure in the process from the prescribed procedures, they must do so with great circumspection. Non-meritorious and ill-conceived applications such as the present, cast an undeserved shadow over the integrity of the electoral process. ***Unfounded doubts can be created in the minds of a populace who have*** only recently been freed from oppressive military rule. Moreover, as we have pointed out above, ***the credibility and impartiality of the I.E.C. have,*** on the facts before us; ***been unjustifiably called into question.***" (Emphasis supplied by me). I agree entirely with the contents of the above passage whose underlined portions aptly apply to what I have observed as undue stalling for purposes of creating unfounded doubts in the minds of this Kingdom's Populace soon after emerging from the baseless queries which were intended to mar the 1998 General Elections.

Mr Phoofolo indicated that the affidavit of the deponent Thoahlane does not bear the date when it was attested to therefore it is invalid. He first indicated that the law he was relying on was an Act. In fairness to him he did not have the material on hand at the time. He was talking from memory. However when he secured the reference material in point to support his submission that the affidavit was invalid it turned out to be a Government Notice No-80 of 1964 on Oaths and Declarations Regulations appearing in Volume IX of 1964 - The Laws of Basutoland Section 5 (2) (b) reading

" Before attesting an affidavit the commissioner of oaths shall ask the deponent whether he knows and understands the contents of the affidavit and if his answer is in the affirmative the commissioner of oaths shall

(a) .....

(b) thereafter set forth, in writing, the manner, place and date of attestation of the affidavit and

(c) .....

It is important to note that Mr Viljoen had challenged Mr Phoofolo to say what authority he was relying on to say the affidavit was invalid because of an

omission to insert a date when the affidavit was deposed. Mr Phoofolo took this reference material to be the authority. But in my view the argument carries weight that since a provision in a Regulation is not the same thing as a provision in an Act the defect could easily have been cured in the reply had the query been raised in the answering affidavit. Further argument gained this Court's favour that the events referred to were prior to the dates contemplated in the papers from which fact it is not obscure to the Court that it was deposed to before it was served at Court.

There is no authority for the view that an obvious omission to comply with a provision in a regulation relating to an affidavit necessarily renders the affidavit invalid. Certainly the invalidity cannot be a logical consequence of the omission to insert a date in the circumstances attendant on this application nor is it a reasonable consequence thereof.

Mr Phoofolo argued that the respondents were not entitled to any costs at all saying nothing of costs on attorney and client scale as this entire saga was a result of a misunderstanding.

In my view there doesn't seem to have been any misunderstanding; nor has there been a possibility of any from the correspondence I have been referred to. All I could discern from the correspondence was the reluctance to give the respondents' attorneys a clear answer to pertinent and relevant concerns and questions raised as to which days among the 7 allocated by the Chief Justice they were opting for. As the applicants were dilly-dallying temporising and ultimately obstructing their attorney Mr Phoofolo from discharging a function as an officer of the Court, the other side were understandably kept unduly and unreasonably anxious whether the application for joinder scheduled for any two of the 7 allocated by the Chief Justice himself as opposed to the Registrar who is an officer perfectly entrusted to discharge such function would ever take off on any of those days regard being had to denials even by the applicants' attorney of matters patently agreed to between them and the respondents' attorneys.

In ***Swissborough Diamond Mines*** (PTY) Ltd and ***Anor is LHDA*** 1999 - 2002 LLR + LB 432 at 455 Beck AJA said "There is much substance in Mr Wallis' submission but it is the manner in which the conspiracy issue was approached and pursued by SDM that, in this Court's view, is deserving of censure. Such conduct has been the subject of special costs awards in the Courts in South African. In - ***In Re Alluvial Creek*** Ltd. 1922 CPD 532 at 555 the Court

said 'an order is asked for that he pays the costs as between attorney and client.' Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, such as malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings were vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice to their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case"

However in the instant case it does not seem to me that an upright purpose was foremost in the applicants perceiving the notion that they should legitimately ventilate their grievance if any before our Courts. The entire saga seems to have been embarked on for pointless delay and unnecessary trouble to the other side. That they went out of their way to obstruct their attorney with a senseless instruction not to communicate with the other side by phone alone deserves of censure. The resultant indulgence in the play of hide and seek by their attorney

shamefully made game of Court process and time. For all these I gave the order that appears at the beginning of this judgement.

M L LEHOHLA
CHIEF JUSTICE

13 December, 2002

For Applicant : Mr E.H. Phoofolo
For Respondents : Advocate HP Viljoen SC (Instructed by Webber Newdigate)